

TRANSCRIPT OF PROCEEDINGS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

IN THE MATTER OF:

EB DOCKET NO. 04-381

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.

ORIGINAL

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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Pre-Trial Conference

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In the Matter of

Florida Cable Telecommunications
Association, Inc.; Comcast
Cablevision of Panama City, Inc.;
Mediacom Southeast, L.L.C.; and
Cox Communications Gulf, L.L.C.,

EB Docket No.
04-381

Complainants,

Gulf Power Company,

Respondent.

Volume 3

Wednesday, March 30, 2005

The hearing came to order at 9:30 a.m. in
room TWA 363 of the Federal Communications Commission,
445 12th Street, SW, Washington, DC, Richard L.
Sippel, Chief Administrative Law Judge, Presiding.

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APPEARANCES:

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I-N-D-E-X

Start Time: 9:35 a.m.
End Time: 10:31 a.m.

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P-R-O-C-E-E-D-I-N-G-S

9:35 a.m.

JUDGE: This is a pre-hearing conference at my call, following up a telephone conference that we had just a few days ago, having to do with discovery schedules of a pole survey schedule of procedures and hearing date in general.

I'm prepared to discuss specific dates at this time, but before I get into that I want to hear from both sides in terms of - well, is there anything that you wanted to report to me this morning, other than what we've talked about?

Mr. Langley?

MR. LANGLEY: Not from Gulf Power.

JUDGE: Okay.

Mr. Joseph or who?

MR. SEIVER: No, Mr. Seiver.

JUDGE: Mr. Seiver.

MR. SEIVER: We had filed our response at noon yesterday, and I think that covered it, and I'm willing to discuss some of the issues that I raised in that, if you want to do that now.

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1 JUDGE: All right, I want to focus, keep
2 focused on dates for the time being.

3 Mr. Shook, anything?

4 MS. GRIFFIN: No, Your Honor, we don't have
5 anything additional.

6 JUDGE: Okay. All right.

7 I just want to - everybody, I suppose, I
8 take it everybody has given their names to the
9 reporter. There's no need to take attendance this
10 morning.

11 Let me start by saying that I haven't
12 mastered, certainly, the Statement of Work, but I see
13 that there's a considerable amount of work to be done
14 with respect to this pole survey.

15 I know that in terms of the response that
16 the Association has filed, the Association of Cable
17 Companies, that there's this concern about that there
18 was a declaration that was filed before the case was
19 set for hearing with respect to the type of proof that
20 Gulf Power was going to introduce in order to prove
21 its case, and you've spent some time on that. Again,
22 refreshing, I appreciate your doing that, because it

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1 gets me focused on something I might not have
2 otherwise paid too much attention to.

3 My bottom line point is this, I don't see
4 any relevance to that at this point. I think the case
5 has been set down for hearing. The standards are, to
6 the extent that the Alabama Power Court, am I right,
7 is that the right case -

8 MR. SEIVER: Yes, Your Honor.

9 JUDGE: - has set down the standard as to
10 whether or not anything above marginal cost is
11 recoverable, anything off - in other words, anything
12 over and above the Commission formula is recoverable.

13 And, in the earlier prehearings that we've
14 had I reached the conclusion that you really can't
15 tell til you find out - you can't even begin to
16 address that issue factually until you find out how
17 many poles are considered to be full, at full
18 capacity, and the burden of proof with respect to that
19 is with Gulf Power.

20 So, we are past the stage now whether or
21 not they might have done something - the quality of
22 the proof that they were working with before this case

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1 was set for hearing, and before we had gotten to this
2 point now, is pretty much by the board, unless you
3 want to use it in terms of deposing - certainly if you
4 are going to depose executives of the company, well,
5 you know, you talked about this then, and now you are
6 talking about this now, you know, that type of
7 examination is certainly appropriate, but as far as
8 I'm concerned, I'm focused on getting this case heard
9 as reasonably soon as I can, based on evidence which
10 I find to be reliable evidence. I think that's the
11 job that they gave me, and I think that we are going
12 down the right road. I'm not too happy with the
13 progress, but, you know, we can talk about that to the
14 extent its necessary.

15 But anyway, that's where I'm coming out on
16 this, Mr. Seiver, so let's not spend a lot of time
17 criticizing the nature of what was submitted back
18 then, and let's focus on what we have to do now.
19 There's a lot of work to do.

20 MR. SEIVER: I understand, Your Honor. May
21 I just comment briefly on this?

22 JUDGE: Surely, surely.

1 MR. SEIVER: And, I agree with the whole
2 approach, and I think this is what we did in our
3 discovery, which I don't know if Your Honor had a
4 chance to look at the interrogatories and the document
5 request that we submitted. We never really asked,
6 give us everything that you were relying on when you
7 submitted your description of evidence. We went
8 through and took the elements that they had described,
9 and what we understand the test to be, and went
10 methodically saying, you know, what do you have on
11 this, this, this and this.

12 And, that was where we were going when we
13 were met with, and we produced boxes of our documents,
14 which actually would be responsive to a number of our
15 own interrogatories to Gulf Power, of the Make Ready
16 request, and the change outs, and everything else that
17 has been done, and the amount of rentals that we've
18 paid.

19 It just became surprising to us that as
20 we've gone through the discovery process, and the one
21 thing that was produced pursuant to your earlier
22 order, when we produced our documents, was the load

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1 studies, which I think we had given an example to the
2 court back in the January status, which had a lot of
3 blanks in it, and, you know, really had a
4 recommendation, and didn't really help us. So, our
5 experts, you know, are not going to be able to really
6 say, well, we don't know what this means, if anything.

7 We are coming up against a wall. We had
8 hoped that we would have information about which
9 poles, and how they are arranged, and what that means,
10 so when our experts would be looking at them they
11 could tell us, you know, this is a full pole, it is
12 not a full pole, or this would be the reason and
13 rationale, and my concern is as we keep going out
14 further, that I don't know what we are going to get on
15 April 15th that's really going to help us.

16 I was concerned that if we don't have the
17 survey done, this audit done, until I'm saying October
18 or November, unless we move everything else out past
19 that, our experts' reports will have been submitted
20 and they would have been deposed, and we would have
21 been done with that all in September.

22 So, I'm concerned that if Gulf Power, as

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1 it says, cannot identify which poles are full, then
2 I'm not sure we're going to be just arguing now on
3 legal theories about what crowded means, or what full
4 capacity means. And, if we are going to do that, I
5 think that's different. I mean, that's a legal issue
6 that we may want to argue with Your Honor, before Your
7 Honor on, to get that resolved.

8 But, I'm more concerned about the facts,
9 and that I'm going to be hamstrung with my people
10 trying to figure this out if we've got another six or
11 seven months, or if we've got to try and do it -
12 expect to end up we're going to see something, I'm not
13 sure what date. We were going to have a draft, I
14 think, of the report, I forget, Your Honor, I think it
15 was in May -

16 JUDGE: I've got the dates all set in my
17 head, don't worry about the dates.

18 MR. SEIVER: Right, and the final report in
19 June.

20 JUDGE: Yeah.

21 MR. SEIVER: And, you know, we are going to
22 be nowhere ready for that.

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1 So, the only concern that I went back to
2 the description is, well, wait a minute, maybe if we
3 had something that would show what was in Gulf Power's
4 mind when they filed the description maybe we could at
5 least get that together and have something to rely on.

6 I'm just afraid that April 15th is going
7 to come, and, Mr. Langley, obviously, is entitled to
8 object to our interrogatories and the document
9 requests. I don't know what we are going to be
10 getting and whether we are going to have start motion
11 practice, and then I'm going to need to take
12 depositions of the people that understand the
13 documents, whether it's going to be the one man that
14 they have, or if we're going to have to start doing
15 third party subpoenas, before our experts can really
16 be able to say, well, I've got nothing to work with
17 except theory.

18 So, that's my big concern, is that as
19 everything is kind of moving further out, everything
20 else is getting caught in this middle, and I at least
21 hoped, even if this survey was going to be something
22 later, that we'd have something to rely on much sooner

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1 than April 15th.

2 JUDGE: All right. Well, you raise
3 legitimate concerns, and I can understand where you
4 are coming from on that, and I don't see - I don't
5 want my comments to undercut your discovery efforts.

6 Anything is fair game, as far as I'm
7 concerned, that was put in issue in this case at any
8 point. So, you know, you are covering that territory
9 to the extent that it's going to make your preparation
10 better, you know, go right ahead.

11 I'm just trying to tell you where my focus
12 is, and I don't focus on interrogatories and document
13 requests until somebody has got a problem, or until
14 it's going to be evidence. So, I'm not - in other
15 words, I'm not following along everything that you do
16 on a regular basis. I know you've done a good job on
17 getting the interrogatories out. I'm expecting you are
18 going to get information.

19 I always was of the impression, years ago
20 when I used to be more focused on these things, that
21 if you get somebody telling you something, that we
22 can't give you the information, we don't know about

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1 that, we are unable to provide that, and if it goes to
2 a critical issue that's very significant information
3 to have. So, at least, you know, you are getting to
4 the point where they are going to have to put
5 themselves on paper, in terms of telling you what they
6 have and what they don't have.

7 That's with respect to your discovery, but
8 then again I want to shift over quickly and say that,
9 but now we have another approach that they are taking,
10 which is the survey, and the survey, you know, may
11 overlap with what you are doing now. At some point in
12 this case it may overlap, it may be things that you
13 are going to discover that are going to show that -
14 it's either going to show an inconsistency with the
15 survey, that's going to give you a basis for attacking
16 the survey in some way. That's all fair game.

17 But, there are two things going on right
18 now, as I'm managing this case, and one is the
19 traditional discovery, the other is this outside
20 effort called the survey. And, you are going to get
21 at the survey, once it's ready you are going to get at
22 it, believe me.

1 So, the problem we have today, however, is
2 that we've got a time problem. We have - you are
3 certainly entitled to have a full exposition of what
4 these people have found in their survey before you are
5 put to the task of having to prove your case. So, I'm
6 not going to deny you anything.

7 The only problem that I have is that this
8 is not going as quickly as I was hoping it would,
9 that's all, that's really what we are talking about
10 here today.

11 Now, there are other things we'll talk
12 about, but that's my main concern.

13 So, do you have anything that you want to
14 respond to, Mr. Langley?

15 MR. LANGLEY: No, I don't really have
16 anything to respond to, but I do want to make clear
17 that we certainly are not expecting the Complainants
18 to submit their expert report before we have turned
19 over our pole audit. If that's what John thought we
20 expected, that's not the case.

21 JUDGE: Not going to happen.

22 MR. SEIVER: Very well, Your Honor. If I

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1 could just make one more point.

2 JUDGE: Surely.

3 MR. SEIVER: I understand that when Your
4 Honor suggested the survey, and I did not object to it
5 at the time, as I thought, well, maybe this will help
6 us move this case along, and I think I had already
7 engaged in a back and forth with Your Honor and,
8 perhaps, Mr. Langley, about whether a survey today is
9 some how or other proof positive of what conditions
10 existed in 2000 and 2001 in the underlying proceeding
11 in which the hearing designation order was issued.

12 But, it seemed in the traditional
13 litigation sense, Your Honor, that if you are in a
14 proceeding and there's discovery, generally, and I
15 took to heart what you said, if the other side says we
16 cannot identify the particular poles on which
17 Complainants are attached they are at full capacity,
18 in a traditional discovery situation, traditional
19 litigation, I think that would be the end of the case.

20 Now, Your Honor has given them a lifeline,
21 by saying, well, I'm going to have this survey that
22 you can do, and whenever that's going to be produced,

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1 in order to identify those poles, which in my mind
2 should have been identified before we even began this
3 proceeding, or as quickly when we began this
4 proceeding as possible.

5 Now, Mr. Langley and I disagreed over what
6 the Alabama Power test said, but it said specific
7 poles, I think he was hoping that he could maybe
8 produce, you know, some survey evidence that was not
9 pole by pole, but in a way, Your Honor, and I think it
10 is helpful to getting the case along, but it's giving
11 them another chance to create or come up with the
12 evidence that I think would have had to have been
13 produced on - well, now it's April 15th, whenever the
14 discovery deadline was, and they said flatly in their
15 motion, we cannot identify what specific poles are
16 full capacity.

17 In a normal situation, I think that would
18 be the case.

19 JUDGE: Well, to me, I think you got the
20 best of all worlds at this particular point in time.
21 They are telling you right now that they can't prove
22 their case. They want more time to do it, and they

1 are telling you exactly how they are going to do it,
2 and when push comes to shove someplace down the road
3 there's going to be disagreement as to whether or not
4 some pole sitting out there in some field in Florida
5 is fully utilized or not. You know, we are going - as
6 night follows the day, unless this case is disposed of
7 in some other way, that's going to be the issue.

8 So, I'm not worried, it's just a question
9 of how we get there and when we get there, and I
10 understand you are saying that I'm giving them two
11 bites of the apple in effect on discovery, or on
12 putting their case together. I don't see it that way
13 in light of what this administrative proceeding is
14 designed to do, in the context of the damages issue
15 that I've been given. This is a type of a case that
16 has been - that has been created by virtue of the
17 damages procedures under the Commission's rules, and
18 so it's in this courtroom, in a relatively narrow
19 context. And, I look upon my job as trying to make
20 that context and put some sense to it, and not just be
21 playing this game of, well, you don't have enough now
22 so you can't, you know, we are going to shut you down

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1 right now.

2 Although I must say, Mr. Langley, I have
3 been tempted to think that once in a while, but that's
4 not really where this case is going to be right now,
5 unless somebody directs me otherwise.

6 So, I mean, let's get that out of here.
7 I think that we need to focus on what we have, what we
8 are going to work with, and getting the job done.

9 In order to accomplish that, we are going
10 to have to have - we're going to have to give you more
11 time, no question about that. No question about that.
12 I don't have any - I don't really - I don't have that
13 much control over your expert surveyors or your
14 contracted out surveyors, and, you know, as long as
15 this doesn't get to be a dilly-dally operation I'm
16 going to work with you as best as I can on that, Mr.
17 Langley.

18 I'm not working with you for purposes of
19 getting your case together, I'm just - just the
20 schedule, this is a railroad we are running here
21 today.

22 All right, now, and I want to get back to

1 some of these concepts you are talking about, Mr.
2 Seiver, because I think this, I think that there's a
3 lot of discovery, there's a lot of thought that can go
4 into the other aspect of this case, that is, assuming
5 for purposes of discussion that you do have 100 poles
6 that are going to be litigated with respect to fully-
7 utilized poles, 100 of them can be pinpointed. And,
8 maybe you might not agree with it, but Gulf Power can
9 say, look, every single one of these poles is fully
10 utilized and here are the reasons why.

11 All right, now what do we do with that
12 information? How do you figure that you go from, what
13 is it, \$6.00 a pole, to \$38.00 a pole or something
14 like that? How do you get those numbers out of that?

15 And, there's the other aspect of this
16 case, can you be discovering on that, or can we do
17 something to flush that out, that aspect out, while
18 this other, you know, all's it is, you know - not all,
19 I'm sorry, it is a very laborious task, labor-
20 intensive task, of counting poles and figuring out
21 what's on them.

22 I'm asking you, anybody here that wants to

1 tell me the answer to that one, why can't you be
2 getting discovery or putting something together? Do
3 you want to put together some kind of a - do you want
4 a proposal to me in terms of what the standard of
5 measurement should be, based on, maybe there's an easy
6 answer to that, maybe there's an easy answer. I would
7 hope that your discovery is going to figure out what
8 - how did they get this number \$38.00 a pole? How did
9 they get that number?

10 MR. SEIVER: I know, Your Honor, and it had
11 nothing to do with crowded poles, because when they
12 asked for \$38.00 there was never a suggestion that the
13 poles are full or crowded, it was the just
14 compensation rate because of the forced access, and
15 that's what we won the Alabama Power case underneath,
16 is that, no, you don't get anything more just because
17 the cable operators could force their face onto the
18 pole, under the Loretto Standard, but then Judge
19 Tjoflat said, but, you know, in the sense that there's
20 a full pole, and you are on there with the other
21 standards, that will allow them to get more. And,
22 that was the first we ever heard of the full pole

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1 issue, and that was the first that either Alabama
2 Power or Gulf Power started telling everybody, well,
3 wait a minute now, we want money for full poles.

4 But, \$38.00 had nothing to do with a full
5 pole at the beginning, that just happened to be the
6 number that showed up on an invoice in 1996 or '97, I
7 can't remember what year, no, I'm sorry, 2000, '99,
8 2000 it showed up.

9 So, Your Honor, and you are right, if you
10 are thinking like a litigator, like I know we all are,
11 say, that's great ground to run in when you've got
12 your experts, is that, well, wait a minute, you didn't
13 even use the \$38.00, and I'm not giving away my
14 strategy because I know Mr. Langley knows these same
15 things too, and, well, wait a minute, this survey was
16 today, what did the pole look like then? Well, wait
17 a minute, are you telling me because this drip riser
18 is within 12 inches here that you couldn't have - the
19 drip loop, that you couldn't tighten that loop for,
20 you know, \$1.50, and then all of a sudden there's room
21 on the pole, that you should be getting \$38.00 as
22 opposed to me paying you \$1.50?

1 We can go through all of that and Your
2 Honor is right, we, in our answers to their
3 interrogatories, lay out our standard, and I think we
4 did it in our alternative cost methodology, that what
5 is a full pole, what is a full capacity pole, and I
6 think we also made it clear that as long as that can
7 be changed out, rearranged, tighten a loop, put a
8 riser, a cover on one of the risers, move everybody
9 up, which generally is paid for by the attachers or
10 the person causing the need for the attachments to be
11 rearranged under 224I, that that would be the
12 compensation, and we'd pay that.

13 So, to me, if there's no loss to
14 opportunity, we make the pole taller, we spend \$5,000
15 and buy Gulf Power a new pole, and everybody goes on,
16 and we pay that expense, then I'm not sure how they
17 could ever come up with, well, plus you should pay us
18 \$38.00, or something more than the rental for the pole
19 that you just brought for us and put in so everybody
20 could be on it.

21 Those legal issues, in fact, Your Honor,
22 I would prefer briefing those now and maybe, perhaps,

1 getting a ruling from the court as to what full
2 capacity means, and this marginal cost issue as far as
3 what it costs to have avoided the lost opportunity,
4 which is the underlying issue in the Tjoflat test, if
5 we call it that.

6 JUDGE: Well, I don't mean to stop you
7 there, but I'm not going to do - I certainly am not
8 going to get into the - I'm not going to be put in a
9 position of trying to define what full capacity means,
10 other than beyond what the courts and the Commission
11 have held as of this point.

12 You raise the point about, well, this only
13 applies to, what is it, 1999 to 2000, in that time
14 frame, I don't know what the answer to that one is,
15 maybe Mr. Langley wants to say something about it, but
16 I think - why don't you say something about it?

17 MR. LANGLEY: Well, we actually addressed
18 this at the first prehearing conference, I think, in
19 mid-December, and I believe that Your Honor said at
20 that time that the temporal scope of what we are
21 talking about would be at least as broad as the
22 temporal scope identified in our description of

1 evidence.

2 What we are really looking for in this
3 proceeding is not - is some back rents that we can
4 tender owed in two very limited years, but some
5 framework for a going forward arrangement with these
6 cable companies.

7 I don't think that they are contending
8 that the only years at issue are 2000 and 2001. If so,
9 they owe us the difference between \$6.50 and \$40.60
10 for '02, '03 and '04.

11 So, the scope that we are dealing with
12 here is more broad than 2000 and 2001.

13 I did want to go back to the \$38.00 issue,
14 and make sure that's put in the proper historical,
15 postural context. First of all, this \$40.60, I think,
16 that Gulf Power claims is just compensation charge, it
17 was \$38.81 that Alabama Power contended was its just
18 compensation charge, and those were not pulled out of
19 thin air. They were developed using a current
20 replacement cost methodology, and they had a good bit
21 of discovery on those issues of the underlying
22 proceeding. They had an expert. We had an expert,

1 and I'm saying discovery, exchange of information
2 about the methodology, not through discovery. And so,
3 that's not, I don't think that that's a mystery to the
4 cable companies.

5 I will say, and I have already said in our
6 preliminary statement of alternative cost methodology,
7 that we are not necessarily going to rely on the same
8 figures for the just compensation charge that we used
9 in the last proceeding. It is my expectation that the
10 number that we suggest at the end of the day, for
11 poles that we contend are crowded, is going to be less
12 than the \$40.60.

13 But, a lot of that will have to do on
14 physical plant costs, operational costs, other FERC
15 accounts that even everyone in this room would agree
16 are proper to consider in a rate methodology, and
17 we'll have evaluation experts opine on what they
18 believe the reasonable range is based on several
19 different methodologies, including the federal leasing
20 concessions model that we identified, the sales comp
21 approach, and the current replacement cost approach.

22 JUDGE: Well, my only point - thank you

1 very much, Mr. Langley, but my point, basically, is,
2 is that you've got a lot of things to think about and
3 a lot of things that it seems to me that you could
4 pursue discovery on, that have nothing to do with the
5 bottom line of the pole survey.

6 So, I don't think you are being held up on
7 - to the extent that you seem to be indicating.

8 MR. SEIVER: Well, Your Honor, if that's
9 the case, and we do get something, you know, beyond
10 objection on the 15th, where we ask for all this
11 information, see, a lot of our requests are basically
12 on a pole-by-pole issue we want to know about, you
13 know, make ready, and what's been done, and who is on,
14 and I'm just concerned that all of those are going to
15 be deferred.

16 Now, if we want to - if they are going to
17 give us something that has to do with how they
18 calculated under the FCC's formula, we've never had a
19 problem with the FCC's formula, that's what we rely
20 on. That's why I was curious and I wanted to hear
21 some more from Mr. Langley, is the rate that is going
22 to be proposed based on - if it's based on the FCC

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1 formula then I don't know why we are here.

2 MR. LANGLEY: I can say that our current
3 replacement cost methodology will have a lot of
4 similarities to the cable rate and the telecom rate.
5 The key difference, and there will be some other
6 differences, but the key difference will be the use of
7 current replacement cost versus historical costs.

8 And, I don't mean to minimize what we
9 anticipate the distinctions to be, and this is not a
10 perfected methodology at this point, this is a work in
11 progress. We are working with evaluation experts on
12 this. But, a lot the same FERC accounting that goes
13 into the cable rate will be the accounting that we use
14 in our current replacement cost methodology.

15 JUDGE: All right.

16 Well, if this can be identified in
17 response to interrogatories, and, as I said, there's
18 always the follow up deposition discovery. I'm just
19 trying to get the concept in my mind, satisfied in my
20 mind, that there are things - there's a lot of busy
21 work that can be done while we are waiting for these
22 poles to be counted, that you would have had to do

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1 anyway if you are going to discover for a hearing on
2 this.

3 I've said what I'm going to say on it.
4 You're going to have to wait until - why don't we make
5 it April 18th, I hate to have somebody do something on
6 April 15th. That's a terrible date. So, we'll move
7 you to the 18th, and that's when you are all going to
8 exchange these responses to interrogatories,
9 production of documents, and then we'll see where we
10 can go.

11 Mr. Seiver, if you've got a problem with
12 what you are getting, and you think that there's an
13 unreasonable basis for answers to specific questions
14 saying that we'll wait until the survey is completed,
15 you know, you can file a Motion to Compel, or you can
16 ask for another conference, and we'll, you know,
17 address it, I will address it. I'm not at all adverse
18 to doing that.

19 But, it's too early to tell.

20 MR. SEIVER: Very well, Your Honor.

21 JUDGE: Okay.

22 Now, does the Bureau have anything more on

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1 that subject?

2 MS. LIEN: No, Your Honor.

3 JUDGE: Thank you.

4 Let me tell you some dates. April 18th,
5 that's when you are going to respond to the
6 outstanding interrogatories and document requests.

7 I've got dates that are set in orders 05
8 M-03, and 05 M-06, three dates in May. May 2, the
9 interim report, May 3, a status conference, and May
10 16th, a preliminary report, all having to do with the
11 pole survey. Forget about those dates. Those dates
12 are gone, they are history, they are no longer going
13 to be considered.

14 What I'm going to require Mr. Langley's
15 client to do, Gulf Power, is starting April 29th, and
16 continuing on the last business day of each month
17 through August 31st of this year, there will be a
18 monthly progress report submitted, which will include,
19 at a minimum, the number - again, this is from your -
20 based on what your surveyors are telling you, the
21 number of poles to survey, the number of poles that
22 have been surveyed within that period of time, up

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1 until the date that the report is filed, three, the
2 number of poles estimated at full capacity that have
3 been inspected, four, any problems encountered or
4 anticipated, you know, is the land too marshy, is it
5 raining, is it whatever, and then finally, five, the
6 estimated time for completion. Okay? And, you know,
7 there may be some other categories that you want to
8 put in there, but, basically, those five categories is
9 the information that I want to receive on a monthly
10 basis. That runs through August the 31st.

11 September 30 will be a little bit
12 different. There will be, in addition to the status
13 information, there will be a preliminary report of the
14 type that was contemplated under Order 05 M-03.

15 Now, I'll explain the reason why after I
16 get - let me go through the dates first.

17 On October 31st, which will be the next
18 filing period or reporting period, that will be the
19 final report. October 31st is when you'll put
20 together exactly what has been found with respect to
21 the survey.

22 On November the 18th, the following month,

1 there will be an exchange of the summaries of the
2 expert testimony, as provided by Federal Rule Civil
3 Procedure 26B, we've been through that.

4 On November the 28th through - I'm sorry,
5 on November the 28th, to and including December the
6 12th, there will be the depositions of the testifying
7 experts taken, and by December 16, 2005, discovery
8 will have been completed.

9 Now, within December 16th and today, all
10 discovery is still open. There's not going to be any
11 freezing of this case or putting the case on hold.
12 Everything is open with the exception of the pole
13 survey.

14 Now, that takes us through December 16th.

15 Starting on January 13th of next year,
16 there will be an exchange of cases. January 23rd
17 there will be notification of witnesses for cross exam
18 and the submission of any hearing subpoenas that you
19 feel may be needed.

20 February the 7th at 9:30 a.m., Mr.
21 Langley, that will be in the courtroom, there will be
22 a documents admission session.

1 Then on March 3rd, Gulf Power will
2 exchange its trial brief, on March 20 the reply briefs
3 will be exchanged, reply trial briefs, and on March
4 28th at 9:30 a.m., in this courtroom, the hearing will
5 commence.

6 Now, as I say, discovery is ongoing
7 through December 16th, except for the experts and
8 except with respect to the specific requirements on
9 the pole survey.

10 If you are not getting answers to
11 interrogatories, Mr. Seiver, you can file Motions to
12 Compel, you know, we'll follow up on anything that you
13 are interested in having us pursue.

14 I think this gives everybody - it answers
15 the time problems, and I think - I know I may have
16 invited - I may have invited some motions practice,
17 maybe I shouldn't have done that with respect to
18 damage methodology. I'm going to hold off on that.
19 My feeling is that you are going to want - you know
20 what the expert - we went through this before, too,
21 each side is going to have two experts, one on the
22 physical count side or something, and then one is

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1 going to be on the methodology side, the determination
2 of damage side. Isn't that true? The measurement of
3 damage.

4 MR. SEIVER: I think on behalf of the
5 Association representative, yes, we wanted at least
6 two, or only two, one for economics and one for poles.
7 I'm not sure if he'll be a survey expert, but at least
8 a pole engineering expert.

9 JUDGE: Sure, sure. Okay.

10 MR. SEIVER: And, I didn't know if Mr.
11 Langley had made that same -

12 MR. LANGLEY: No, our testifying experts
13 will be an evaluation expert and then someone to,
14 essentially, authenticate the results of the survey we
15 contracted. There will be Gulf Power engineers
16 testifying about I think the issues that Mr. Seiver
17 has addressed with respect to what a pole can and
18 cannot do.

19 JUDGE: Well, the way I had it before, we
20 had it limited to two experts a piece. There might be
21 some fact witnesses that you had to bring in to lay
22 the foundation for the experts, if you've got

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1 engineers that, you know, physically were involved in
2 counting or something of that nature I would put that
3 in a different category. I'm talking about the ones
4 that are going to submit themselves to being deposed
5 as your testifying experts.

6 MR. LANGLEY: And, maybe I need to seek
7 some clarification on that, because we will - Gulf
8 Power engineers, I had anticipated, would testify
9 about the feasibility of some of the things they will
10 contend can be done to any pole to provide capacity.

11 I didn't necessarily put that in the
12 expert testimony category, because they are our own
13 witnesses. We do not intend to hire a third party
14 engineer to testify about the engineering aspects or
15 to rebut their engineering expert.

16 JUDGE: I'm just talking about experts that
17 you would proffer as an expert, in other words, with
18 all the - you know, all the foundation work that would
19 have to go into qualifying the person as an expert.
20 Those are the testifying experts that I'm talking
21 about as being in a special category. If you not
22 going to use any, that's your privilege.

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1 MR. LANGLEY: I just wanted to limit it, I
2 didn't want to get involved with a bevy of experts
3 coming in, academic types, coming in here and
4 testifying about the same thing. That's why I limited
5 it to two.

6 Mr. Seiver pointed out that he needed one
7 for, you know, the physical count, one to test the
8 physical count, I guess the credibility of it, the
9 weight to be accorded it, and then the other being,
10 you know, the methodology, more of an economist type,
11 who would take the data and then run with it.

12 MR. LANGLEY: I think there may be a slight
13 disconnect here, because I guess in one sense the
14 evidence that our contractor is going to demonstrate
15 is not really expert testimony at all, but fact
16 testimony based on an extensive investigation. And,
17 I don't think that they intend to offer an alternative
18 audit of the poles, but instead I expect that their
19 second expert, second meaning excluding the evaluation
20 expert, is going to be an engineer who testifies about
21 what can and cannot happen on a pole.

22 From our perspective, that will be a Gulf

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1 Power person. So, if you are not counting the - if
2 you are not counting Osmose as an expert, which really
3 they aren't, they are an auditor, they are doing a
4 physical count and are going to report on their
5 results, then we are still using no more than two
6 experts, assuming that you are counting the Gulf Power
7 personnel as experts.

8 I just want to be as candid as possible
9 about my -

10 JUDGE: No, this is good that you are
11 raising this.

12 Mr. Seiver?

13 MR. SEIVER: Your Honor, Mr. Joseph had
14 reminded me that before, and now I see where this
15 change in the procedure date is an issue, when we were
16 going to have the reports done between the time of the
17 reports, the whole survey being done, and the experts
18 depositions, that was going to be a number of months.
19 And, one thing that I had counted on doing was taking
20 the deposition of whomever the Osmose people are that
21 are doing the survey. I think when they do their
22 report, whether you call it an expert report, or a

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1 fact report, that I'm going to need to be able to
2 examine that person and, hopefully, not for the first
3 time at the hearing in March. And, my concern is, is
4 that, you know, as soon as the report is done in final
5 on the 18th of November - no, I'm sorry -

6 JUDGE: Well, let me back up with those
7 dates again. The 31st of October is the final report.

8 MR. SEIVER: Right.

9 JUDGE: That preliminary report should be
10 a pretty solid piece of work that would give you - I
11 did want to footnote that mentally, that's being
12 required, primarily, for the purposes that you are
13 talking about. You should have enough grist to go in
14 and take some very meaningful depositions at that
15 point. It might not be the deposition of the ultimate
16 expert, if they are going to put an expert on, but you
17 certainly ought to be able to go in and get - after
18 you get that preliminary report, you should be able to
19 get people at - what's the name of this company again?

20 MR. LANGLEY: Osmose Utility Services.

21 JUDGE: Great name, Osmose, and you might
22 be able to - you know, you can then start pulling

1 together what it is you are talking about. So, that
2 gives you to September 30th.

3 MR. SEIVER: Okay, Your Honor, if the
4 understanding is, and what my concern would be is, you
5 know, if I take a deposition of an Osmose person
6 between September 30th and October 31st, say well
7 that's going to be dealt with in the final report, I
8 feel like they are going to have another bite at the
9 apple. If I find something that's wrong, they'll say,
10 ooh, that's great, that final report is going to get
11 changed.

12 So, I kind of want to have this be it,
13 this is final, rather than them testifying on a draft.

14 JUDGE: I see what you say, I can't - you
15 know, there's nothing I can do to make this thing
16 pristine pure. You can, I mean, to put themselves in
17 a position with the preliminary report and then start
18 changing it 30 days later, that doesn't help. That
19 doesn't help one's credibility too much.

20 MR. SEIVER: Well, Your Honor, if I could
21 suggest, and I know you've crafted this, that if we
22 have a final report due date I would like to have the

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1 opportunity to take the deposition of whomever is
2 going to sponsor the report, or the people, I don't
3 know how many people are going to be committed to
4 this, if Mr. Langley says it's going to be a dozen
5 people, I'm going to feel uncomfortable if I don't get
6 the right person to talk to. But, I don't know if
7 there will be notes that will come with it.

8 I would like to be able to start my
9 depositions on the report some time after October
10 31st. I mean, if I've only seen it on September 30th,
11 obviously, I'm going to need some time to review it,
12 look at it with my experts to try and figure out, you
13 know, this is where I need to inquire.

14 I'd be happy to start right after the
15 final report is filed on the 31st, I'm just concerned
16 that with the 18 days before our expert summaries have
17 to go in, that I'm going to be working on taking
18 depositions of the Osmose people.

19 And, I'm not trying to burden you, Your
20 Honor.

21 JUDGE: You are not burdening me. We will
22 - you know, we can make some tweaks and adjustments

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1 down the road, but let me tell you what my thinking
2 was on that, just first of all, exactly what I said,
3 but in addition to that you'd note that on November
4 28th through December 12th, that's when you will have
5 the depositions of your testifying experts. So, all
6 of that discovery that you take between September 30
7 and that time, and you might be taking depositions
8 starting on September 30th, or October 1st, of some of
9 the - I don't want to call them the lesser persons,
10 but the persons who are doing the more day-to-day
11 tedious tasks, to be able to find out from them, you
12 know, who they are reporting to, what they are
13 reporting, what they've been told to do, that kind of
14 thing, so that by the time you get up to testifying,
15 taking the "experts," and I'm using that term very
16 broadly here, obviously, if you want to take testimony
17 of people who are not being proffered as experts, but
18 were the people who you found out to be the
19 responsible people who are signing off on that
20 document, then fine. Fine.

21 I mean, I have to use some kind of
22 terminology here to make clear what it is I'm trying

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1 to accomplish.

2 So, I don't think anybody is going to be
3 cut, I can't conceive that you are going to be cut out
4 of discovery. I mean, I really don't see that.

5 Another footnote to that, I had the
6 impression that there was going to be what you are
7 talking about, that there would be at least a platoon
8 of people out there doing all this kind of work. We
9 find out that there was one person that was setting
10 this thing up, before they got the Osmose firm, and
11 then he retired or something, so that slowed
12 everything else down. They had one person that was
13 doing the discovery, and was getting this thing set up
14 for this - you know, this work product that was going
15 to be - that they hired the Osmose firm for.

16 So, I don't know if there's going to be -
17 I don't mean to say it any kind of a negative way, Mr.
18 Langley, but it just seems to me that there's not
19 going to be a huge amount of discovery in the context
20 of it being a lot of lot of people.

21 Am I right?

22 MR. LANGLEY: I think that is right.

1 JUDGE: And, you've got discovery, you are
2 getting answers to interrogatories now, you can ask
3 supplemental interrogatories, say, who are the people,
4 what are they all doing, who are the people who are
5 having anything, directly or indirectly, to do with
6 this Osmose study? Who are they? What are their job
7 descriptions? Who do they report to? I mean, you
8 should be loaded for bear by September 30th, I am
9 hoping, you know, that was my intention.

10 My intention is to give you as much as you
11 possibly could need, plus more, in order to have your
12 discovery completed in time to hear the case in March.
13 So, if I'm not getting you that, let me know.

14 Okay? Anybody else have anything more on
15 dates? No.

16 Mr. Shook, your team, do you have any
17 problem with these dates?

18 MS. LIEN: No, Your Honor.

19 JUDGE: Okay. Does anybody else have
20 anything more? Do you want to add anything to what
21 we've talked about? Is there any other subject matter
22 in connection with this that anybody wants to hash

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1 over?

2 MR. LANGLEY: No, Your Honor.

3 JUDGE: Mr. Seiver?

4 MR. SEIVER: Well, Your Honor, given where
5 we are I think anything I say now could be met with,
6 well, that's premature, I'll just have to wait and see
7 how things turn out, as long as Your Honor - I can
8 approach the Board at any time, obviously, if I feel
9 like there's a discovery problem, or if we need
10 another hearing then I'll wait and see what happens on
11 April 15th.

12 JUDGE: Right, okay.

13 Well, as I say, I'm going to try and keep
14 this to a minimum. I don't think - I think your time
15 is better spent, more productively spent, outside the
16 courtroom getting all these - getting answers to all
17 of these questions. But, if you need me, I'm here, as
18 you have learned, I mean, but please try and
19 accommodate me with, you know, a week's notice or
20 something. This business of having a discovery
21 deadline come up and then deciding the day before to
22 call somebody and say I can't make the deadline, I

1 mean, that's not the way to operate. That doesn't -
2 it's not fair to yourself, it's not fair to me.

3 MR. LANGLEY: Your Honor, may I address
4 that?

5 JUDGE: Sure, go right ahead, Mr. Langley.

6 MR. LANGLEY: There's too much to say, and
7 I regret putting everyone in these circumstances, but
8 to be frank, I thought that I was doing the right
9 thing by contacting John and Brian the day before, so
10 that we were not in a situation where the following
11 day they are receiving my Motion of Extension of Time,
12 while at the same time they are serving their
13 responses to my interrogatories.

14 So, I did that, really, for their benefit,
15 so that they could make the decision as to whether or
16 not they wanted to serve their responses. And, the
17 next thing I know we're on a conference call, and Your
18 Honor sets a deadline for the week following filing
19 the Motion for Extension of Time, so I mean I didn't
20 file one that day for that reason.

21 I wish that I had known prior to the day
22 before that we were not going to be in a position to

1 do that, and I would have reacted accordingly, but I
2 did - I sent them that e-mail the evening before the
3 deadline thinking that that was the right thing to do,
4 not just a flippant or, what was the word you all used
5 in your submission, a blithe remark. I genuinely
6 thought that that was the way that it should be
7 handled.

8 JUDGE: Well, you know, I don't want to
9 belabor it, I appreciate your addressing it in that
10 fashion, and the Bureau, when they filed their comment
11 to your Motion for an Extension of Time, pointed that
12 out, too.

13 If you saw that you were going to have a
14 problem, that motion should have been filed like a
15 week before the deadline, not - I mean, you did the
16 right thing, yes, if you were realizing you were up
17 against the end, and you are not going to be able to
18 produce, surely you should be telling people that.
19 But, my point is, and I think the Bureau's point is,
20 is that, you know, this thing should be thought
21 through enough ahead of time so that you are filing
22 your motion maybe a week before the deadline. Say,

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1 look, I've got this problem coming up and I'm not
2 going to be able to make it, so I'd like more time.
3 Then, you know, we can do it in some kind of an
4 orderly fashion and not be running around picking up
5 telephones trying to resolve it all over a phone
6 conversation, which I don't mind doing, but, you know,
7 that's my comment. I'm not coming down hard on this
8 at all, but it's food for thought.

9 There's a lot, I mean, there's just a lot
10 here. There's an awful lot here.

11 I certainly, in the trial briefs that you
12 are going to exchange, you will have - and I will be
13 requiring that you spell out all these theories that
14 you articulated early on, and I'm expecting the
15 discovery incident to those theories is going to be an
16 ongoing proposition if you don't get on the 18th of
17 April what it is you feel that you need.

18 But, what I'm trying to come up with is
19 some kind of a way in which I can be clued in before
20 the exchange of trial briefs just exactly what it is
21 that I'm going to be expecting to see in terms of
22 testimony.

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1 So, if you are following what I'm saying,
2 I want to give myself enough time to be educated in
3 the case, is what I'm trying to say. And, maybe what
4 I'm going to need to do is have another prehearing
5 conference in the fall for that purpose.

6 On the other hand, I don't want to get you
7 in a position where you are feeling that I'm - you
8 know, I'm asking you to disclose your case ahead of
9 time. I just - if anybody has any ideas on how you
10 might want to approach that.

11 MR. SEIVER: Well, Your Honor, I hadn't
12 really thought it through, but one of the things that
13 I know is going to happen is, we are going to be
14 arguing about, not only methodology, but what is
15 legally required, constitutionally required,
16 applicable under the 224I, what APCo versus FCC says,
17 that's going to be a lot of legal argument that we
18 will, obviously, have to include in our trial brief,
19 not just a recitation of evidence and other
20 evidentiary issues.

21 And, I don't think it would be really
22 laying our case on the table, necessarily, if some

1 time in the fall, and I'm not sure what would be the
2 appropriate date, we could come before the court and
3 kind of give maybe a status. And, maybe we should
4 even do it before then, maybe we should do it once
5 early in the summer to say, here's we are in
6 discovery, if we already haven't had to get your
7 services, obtain your services on a Motion to Compel
8 to resolve something else, say we've taken the
9 depositions of, you know, 15 Gulf Power employees,
10 taken the deposition of, you know, four Cox or
11 Mediacom employees, and kind of just give you an idea
12 of where we are.

13 And, in addition to that, perhaps, and
14 Your Honor did not set a number of days for the
15 hearing, we would be able to, you know, force us to
16 come up with an idea of how long Gulf Power thinks
17 their case is going to take to present, and we can
18 give you an idea how long our case is going to take,
19 and maybe that will help lay out for you, so you
20 understand, well, I'm going to have to have four fact
21 witnesses on this day, and another, you know, ten fact
22 witnesses, and then give you an idea.

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1 JUDGE: Well, I will know that. I will get
2 that when you exchange your cases, and when you
3 exchange your trial briefs.

4 MR. SEIVER: In January, yes, sir.

5 JUDGE: I will know, basically, you know,
6 how long you expect to try the guts. That's one of
7 the ingredients of the trial brief. I mean, I'll be
8 issuing more instructions on this.

9 But, what I'm talking about is that these
10 - for want of a better word - these esoteric theories,
11 in terms of economic damages and this type of thing
12 that we are talking about. I want to be sure that I'm
13 flushing that out for my own benefit early enough. I
14 mean, getting it in the trial brief is going to be
15 pretty - maybe that's the answer, just the trial
16 briefs. Trial briefs are, what do I have them going
17 in March, the 3rd and March 20th, and then the hearing
18 on March 28th.

19 I don't know, let me think about that, and
20 you all can think about it, too. If you all feel that
21 there's a way, again, I want to - let me present this
22 again in the right context, I don't want to have you

1 prematurely being disclosing the theory of - the
2 ultimate theory of your case, the ultimate theory
3 where you feel recovery is going to be based on.

4 On the other hand, there's been an awful
5 lot of this that's gone on in this case before I got
6 involved in it, and I know you gave me - I remember we
7 went through this, we went through this early on, the
8 methodology and all, and you gave me statements on
9 that, too. Is that what I can rely on for purposes of
10 preparing for this hearing, in addition to what's
11 going to be in the trial brief, or do I need something
12 more? And, you all can think about that yourselves.
13 You don't have to answer me now.

14 I just want to be sure that I'm
15 comfortable and that I'm prepared, but, you know, I'm
16 throwing that out in a very loose sense, because what
17 usually happens in these cases is, you get closer and
18 closer to the hearing date, I learn more and more
19 about the case, and who knows, maybe this thing will
20 - maybe it will settle before then.

21 Let me make one other comment about this.
22 This is about the dates, though. The 1999 versus

1 2000, I'm not altogether clear on where you are coming
2 out on that, Mr. Langley, in terms of bringing those
3 dates forward on the evidence. But, you certainly are
4 going to have a count on these poles that's going to
5 be current, and whatever the methodology is that is
6 going to be used to say, well, because of the "full
7 capacity" of these poles these are the factors that go
8 into it, and this is why we want to charge such and
9 such an amount of money, and that's going to be
10 current information.

11 Now, whether you apply that to poles going
12 back 1999 to the present, you know, is something else
13 I guess to wrestle with. But, my bottom line feeling
14 is this, is that if this case does go to a full-blown
15 - we go through all of this evidence, we get all of
16 this testimony, and there are findings made in this
17 case, and it goes up to the Commission, at some point
18 in time - I mean, if there is no settlement in this
19 case the standard is going to be set for what it means
20 to have a full capacity pole, and on how much - you
21 know, what is a reasonable amount of just compensation
22 with respect to the renting out of full capacity

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1 poles. And, somewhere - there's a lot of ways to say
2 the same thing, but my point is, is that somewhere
3 along the line there will be a definitive standard
4 come out of this case, at least that's what the object
5 is, and that once you get the standard, you know, then
6 you can make the applications to the past, future and
7 whenever.

8 So, I'm not too much concerned about the
9 application - the specific application of the dates,
10 the issue is there, just as you have articulated it.
11 I don't want to deminimize it, but what I'm after is
12 addressing the standard of full capacity as talked
13 about in the Alabama Power - and as the Commission
14 adopted that. So, we will see.

15 All right, that's it then. I will get an
16 order out on these dates. If I have not anticipated
17 the need - all the needs with these dates, I will
18 expect the parties to bring it to my attention by way
19 of a motion or whatever, asking, you know, if you want
20 to have a telephone conference on something, you know,
21 I have no problem with that. But, anyway, I'll get
22 this out, and unless there's - we may not see each

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1 other until the fall, unless there's another specific
2 need.

3 Thank you very much.

4 MR. SEIVER: Thank you, Your Honor.

5 MR. LANGLEY: Thank you, Your Honor.

6 (Whereupon, the above-entitled matter was
7 concluded at 10:31 a.m.)
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CERTIFICATE OF REPORTER, TRANSCRIBER, AND PROOFREADER

FLORIDA CABLE TELECOMMUNICATIONS ASSOCIATION, INC., ET AL.

Name of Hearing

EB DOCKET NO. 04-381

Docket No. (if applicable)

445 12th STREET, S.W., WASHINGTON, D.C.

Place of Hearing

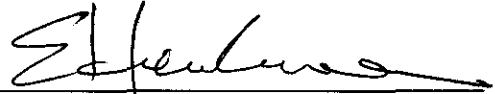
MARCH 30, 2005

Date of Hearing

We, the undersigned, do hereby certify that the foregoing pages, numbers 166 through 218, inclusive, are the true, accurate and complete transcript prepared from the reporting by _____ Eric Hendrixson (Reporter's Name) in attendance at the above identified hearing, in accordance with applicable provisions of the current Federal Communications Commission's professional verbatim reporting and transcription statement of Work and have verified the accuracy of the accuracy of the transcript by (1) comparing the typewritten transcript against the reporting or recording accomplished at the hearings and (2) comparing the final proofed typewritten transcript against the reporting or recording accomplished at the hearing or conference.

April 11, 2005

Eric Hendrixson



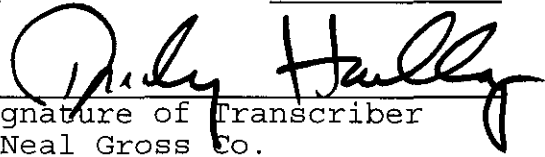
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April 11, 2005

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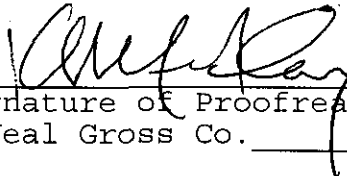
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